No. 80-264

1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES,

AND

UNITED STATES OF AMERICA, PETITIONERS

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MEYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondent principally argues (Resp. Br. 3-4, 7-9, 20) that, under principles of contract law, the access-to-records clause should be construed to be inapplicable to the cost records at issue in this case. As discussed in our opening brief (Pet. Br. 3-4, 37), however, the clause was required to be included in the contracts by 10 U.S.C. 2313(b) and 41 U.S.C. 254(c),

and its meaning is necessarily determined by those statutes rather than by the intentions of the parties. Where a statute directs that a contract contain a specified provision, such a statute is, as Professor Corbin has explained,

> one that prescribes the legal operation of contracts, not one that affects factual interpretation. If in exact obedience to the law, the specified provision is integrated into a written contract in exact terms, the provision must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it. Exactly the same result is reached even though the parties know nothing of the statute and do not include the provision, and even though they know of it and expressly agree upon the exact contrary.

3 A. Corbin, *Contracts* § 551, at 200-201 (1960) (footnotes omitted). Thus, the maxims of contract construction cited by respondent are simply inapposite here.[1]

b. With respect to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c), respondent contends (Resp. Br. 11) that the Comptroller General's construction would make the access statutes redundant with 31 U.S.C. 53(a), which provides that "[t]he Comptroller General shall investigate * * * all matters relating to the receipt, disbursement, and application of public funds" and

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[1] Respondent's attempt (Resp. Br. 19-20 & n.31) to distinguish the authorities relied on in our brief (Pet. Br. 37) is wholly unpersuasive. Indeed, the fact that the access clause in the contracts was required by statutes rather than administrative regulations serves, if anything, to reinforce the conclusion that the meaning of the clause turns not on the agreement of the parties but on the construction of the legislation.

"shall make recommendations [to Congress] looking to greater economy or efficiency in public expenditures." However, as we discussed in our opening brief (Pet. Br. 13), 31 U.S.C. 53(a), while not a source of authority for GAO to inspect contractors' records, is part of the background and context in which the access provisions were enacted. And, contrary to respondent's assumption, Sections 2313(b) and 254(c) were designed precisely "to fill a gap left by section 53(a)" (Resp. Br. 11). See Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349, 388 (1970):

> While the 1921 and 1950 Acts [which include 31 U.S.C. 53(a)] are broad enough to support the Comptroller General's audits of Government contracts, they give him no right to examine the books and records of Government contractors. This was remedied by statute and now all negotiated contracts are required to contain [access-to-records] clauses * * *.

Relying on the addition of the word "directly" to the access provisions introduced by Representative Hardy, respondent contends (Resp. Br. 3, 5, 13-14 & n.24) that Congress intended to be "miserly" (*id.* at 2) and "parsimonious" (*id.* at 3) with the access authority provided to the Comptroller General. For the reasons previously discussed (Pet. Br. 19), we do not believe that this amendment, to which Representative Hardy readily agreed, should be read to effect a significant contraction of the Comptroller General's right of access or to exclude records that are legitimately needed to determine the reasonableness of the contract price. To accept respondent's argument, in light of the legislative history set out in our opening brief, " 'would be to impute to Congress a purpose to

paralyze with one hand what it sought to promote with the other.'" *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947).

Respondent also contends (Resp. Br. 7-8) that the plain meaning of the term "directly pertinent" in the access-to-records provisions demonstrates that the records of non-manufacturing costs are not subject to GAO examination. However, "[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). See also, *e.g.*, *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) ("we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate"). Here, the evident congressional purpose was to enable the Comptroller General to examine all of a contractor's cost records that are necessary and appropriate to determine whether the price charged the government was "extravagan[t]," "excessive," or "wasteful[]." 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy). Respondent's reading is inconsistent with this remedial purpose and must be rejected.

Moreover, as commonly understood, "direct" means "[i]n the usual or natural course * * *. In the usual or regular course or order * * *. The opposite of * * * collateral or remote." *Black's Law Dictionary* 413 (5th ed. 1979). Similarly, "pertinent" is defined as "[a]pplicable; relevant" (*id.* at 1030). The cost records at issue here are manifestly not "collateral or remote" or "[ir]relevant" to the reasonableness of the contract price, and they fall well within the literal terms of the access provisions. As the court of ap-

peals explained in *Eli Lilly & Co.* v. *Staats*, 574 F.2d 904, 914 (7th Cir.), cert. denied, 439 U.S. 959 (1978):

> [R]esearch and other costs not immediately attributable to one product form such a large portion of the costs of a pharmaceutical product that their import to such a contract seems inescapable. * * * [C]osts such as research and development at the least appear to have a logical, causal and consequential relationship to a portion of the price of the products purchased by the Government. Further, contrary to plaintiff's contention, such costs are not "remote" within the established definitions of that term in relation to at least a portion of the price because their inclusion in the price of the product is not unforeseeable once the costs are incurred, nor is their impact on a part of the price significantly altered by any intervening cause. * * * Thus in relation to the contract as a whole, these costs fit within the common and legal understandings of "directly pertinent." The mere fact that, as plaintiff asserts, it does not or even could not allocate costs such as research and development to an individual contract does not undercut the proposition that those costs are directly pertinent to an individual contract but merely indicates that they are directly pertinent to more than one individual contract.

Respondent further submits (Resp. Br. 12) that exclusion of its non-manufacturing costs from consideration by GAO would necessarily work to the company's disadvantage and therefore would not interfere with the Comptroller General's responsibility to assess the reasonableness of the contract price to the

government. However, in light of the substantial nature of non-manufacturing costs in the pharmaceutical industry (see Pet. Br. 31-33) and the fact that the government was charged respondent's normal wholesale price (*id.* at 34 n.19), it is specious to suggest that GAO could make a determination of the reasonableness of the contract price without regard to such significant unallocated costs as research and development, advertising and promotion, distribution, and administration. Furthermore, notwithstanding respondent's "doubt[s] that the Comptroller General's interest is in demonstrating that contractors' prices are less excessive and more protective of the government's interests * * * than they facially seem" (Resp. Br. 12), it is unquestionably important to GAO to learn whether the present system of negotiated procurement adequately protects the government's interests. Likewise, if the contract price was unreasonable and the negotiation procedures inadequate, it is important to determine the amount of the excessive price and the degree of the inadequacy. Only in this way, by being fully informed of the advantages and disadvantages of negotiated procurements, can the Comptroller General properly discharge his statutory responsibility to study the advisability of reform and to recommend "other methods of meeting future procurement needs." *Hewlett-Packard Co.* v. *United States*, 385 F.2d 1013, 1016 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).[2]

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[2] Respondent's entire argument has failed to identify any congressional purpose expressed in the legislative history of the access statutes, or any sound reason of federal procurement policy, that would support its position in this case. On the contrary, the limited access allowed GAO under respondent's rigid and procrustean interpretation provides for no

Respondent also appears to suggest that the access-to-records provisions were intended by Congress only to protect the government against "improprieties in the negotiation of government procurement contracts" (Resp. Br. 11), "improper pricing" (*id.* at 14), or "'fraud or bad faith or illegality'" (*ibid.*, quoting 97 Cong. Rec. 13377 (1951) (remarks of Rep. Hardy)). This would represent a marked departure from respondent's previous position in the litigation, which has consistently conceded the Comptroller General's right to examine records in the absence of a suspicion of such improprieties and has acknowledged that "[t]he driving motivation of the [C]ongress was to empower the Comptroller General to audit governmental contracts' costs and performance to the end that the government be guarded against excessive cost or waste. The listing [of legislative history] recited in the Petition resounds with that dominant, if not singleminded, purpose" (Br. in Opp. 9). In addition, respondent expressly disclaims this position elsewhere in its brief (see Resp. Br. 5-6, 9, 18).

We doubt that this argument, if in fact it is being advanced by respondent, is properly before the Court. The question presented in our petition concerns GAO's right of access to a contractor's records of unallocated costs that are defrayed by the government's payments under the contract. The issue of whether GAO's entitlement to records depends on suspicion of improprieties is plainly not a "subsidiary question fairly included therein." Sup. Ct. R. 21.1(a). Moreover, this argument would be inconsistent with the judg-

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meaningful review by the government and is completely divorced from any procurement objective that the access provisions could be thought to serve.

ment below (Pet. App. 15a-17a), which allows GAO access to designated records even though there was no allegation or suspicion of impropriety, and therefore it cannot be urged as an alternative ground for affirmance of the judgment. See, *e.g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). As the Court recently explained in *Andrus* v. *Idaho*, 445 U.S. 715, 725 n.6 (1980), "respondent is not entitled, absent a cross-petition, to bring that issue before us; for a favorable ruling would enlarge the relief granted the [respondent] under the Court of Appeals judgment." Since respondent did not cross-petition for certiorari, it should not be heard to raise this issue.[3]

At all events, for the reasons stated in our opening brief (Pet. Br. 15-30) and in our brief in opposition (at 7-17) in *SmithKline Corp.* v. *Staats*, conditional petition for cert. before judgment denied, No. 80-434 (Dec. 8, 1980), the argument that access is limited to the detection of fraud is without merit.[4]

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[3] In addition, since this issue was not presented in the courts below, respondent cannot properly press it here. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). Indeed, as noted in the text, respondent has deliberately declined to argue this position and has "agree[d] that it is obliged by the terms of the contracts to provide access to records of [certain of its costs] * * *" (Pet. App. 8a).

[4] See also *Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts before the Subcomm. on Military Operations of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 577, 639, 649-653 (1965) (statement of Acting Comptroller General Weitzel); H. Wright & J. Bedingfield, *Government Contract Accounting* 150 (1st ed. 1979) ("GAO's audit responsibility is much broader [than that of the procurement agency], usually

c. Respondent asserts (Resp. Br. 10, 15) that the Comptroller General seeks access to virtually all of its books and records. To the extent that broad access is required here, it is, as noted in our opening brief (Pet. Br. 33-35 & n.20), made necessary by the way in which respondent has chosen to maintain its records.

Moreover, the access sought in this case is not nearly so extensive as respondent portrays. First, GAO's request was limited to cost and pricing records. Second, the only material in dispute is confined to records of costs that are a normal and integral part of respondent's pharmaceutical business and constitute significant expenditures in the drug industry (see Pet. Br. 31-33)—in particular, records pertaining to costs of research and development, advertising and promotion, distribution, and administration.

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being directed toward determining the economy and efficiency of the overall procurement process").

Congress has recently reiterated its concern that the Comptroller General have adequate and timely access to contractors' records in order to assess the economy and efficiency of government expenditures. In Pub. L. No. 97-226, Section 102, 94 Stat. 313 (to be codified at 31 U.S.C. 54(c)), Congress authorized the Comptroller General to issue subpoenas if necessary to obtain the books and records "of contractors, subcontractors, or other non-Federal persons to which he has access by law or by agreement of the non-Federal person from whom access is sought." The Committee Reports on the Act emphasize that "this legislation is intended to strengthen the General Accounting Office's ability to discharge its functions as an investigative and auditing arm of the Congress. * * * Congress relies both on the GAO and on the Comptroller General to ensure that * * * agency resources are managed efficiently and economically * * *." S. Rep. No. 96-570, 96th Cong., 2d Sess. 1 (1980); H.R. Rep. No. 96-425, 96th Cong., 1st Sess. 1 (1979).

Thus, GAO has made no attempt to inspect records of costs that are peripheral or inconsequential. Finally, although no examination of respondent's records has yet occurred, GAO has generally found that government contractors maintain certain records—such as summaries for supervisory or management personnel, periodic budget or accounting statements, or monthly, quarterly, or annual reports—that render unnecessary a detailed review of much of the underlying documentation concerning day-to-day transactions.

To be sure, GAO access must be thorough and comprehensive, and many documents will need to be examined because of respondent's record-keeping system. However, it appears that respondent greatly exaggerates the scope of the inspection that is likely to be conducted in this case. GAO seeks no broader access than is necessary and appropriate to determine the reasonableness of the price charged the public fisc by those who elect to do business with the government.[5]

2. a. Amici Merck & Co. and SmithKline Corporation, purportedly filing "in support of the judgment of the Second Circuit" (Am. Br. 1), frame the issue in this case to be "the scope of the Comptroller General's access-to-records authority" (*id.* at 4; see also *id.* at 5). Seeking to "place[] before the Court what *amici* consider to be the proper interpretation of the scope of the access-to-records statutes" (*id.* at 4),

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[5] Respondent cryptically relies (Resp. Br. 20-21) on the Federal Procurement Regulations in 41 C.F.R. ch. 1. Although respondent emphasizes (Resp. Br. 21 n.34) that "indirect costs" are "[t]he very kinds of costs in controversy here," nowhere does it reply to the argument (Pet. Br. 36) that a cost, including an indirect cost, is "allocable to a Government contract if it * * * [i]s necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown." 41 C.F.R. 1-15.201-4.

amici contend that "no cost records of these contractors come within the scope of the access provision" because the contracts were "fixed-price rather than cost-based" and "there was no actual negotiation of prices" at the time the contracts were executed (*id.* at 7-8).

In our view, this is a highly improper submission by amici. Contrary to their characterization, the issue in this case is not whether any records are subject to the access provision, but rather whether the particular cost records withheld by respondent are within GAO's right of access. Indeed, amici expressly acknowledge (Am. Br. 4) that "[t]he position advanced by respondent Bristol in this case * * * is narrower than that presented by [amici] * * *."[6]

For the reasons already stated (see pages 7-8, *supra*), this issue would not be properly before the Court on our petition here even if it were raised by respondent, and certainly it is inappropriate for amici to interject the question into the case. See *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).[7] Moreover, both amici filed petitions for a writ of certiorari before judgment in order to present this argument to the Court, but their petitions were denied. See *Merck & Co.* v. *Staats*, conditional petition for cert. before judgment denied, No. 80-416 (Dec. 8, 1980), and *SmithKline Corp.* v. *Staats*, conditional petition for cert. before judgment denied, No. 80-434 (Dec. 8, 1980). Having failed to persuade the Court to hear their claim, amici should not now be allowed

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[6] Respondent, too, has recognized that amici urge a position far broader than its own (Resp. Br. 5-6).

[7] Amici also repeatedly find it necessary to go outside the record in this case and refer to the records in their own cases as support for the arguments they offer here.

to raise the same issue in the guise of supporting the judgment below.[8]

In light of these considerations, the Court should disregard this contention of amici.

b. Amici advance several arguments that, while directed to the foregoing issue, may be read to bear on the question presented in this case. Accordingly, we shall briefly respond to these points.

Amici argue (Am. Br. 12-14) that the legislative history of the 1951 amendment to the First War Powers Act,[9] which was substantially similar to the access provisions at issue here, indicates that 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) should be narrowly construed. Similarly, they argue (Am. Br. 20-21) that GAO's contemporaneous construction of the access provisions, which refers to the history of the War Powers Act amendment, contradicts its position here. Neither of these arguments is correct.

Nothing in the language or history of the First War Powers Act casts doubt on our argument that respondent's records of unallocated costs are subject to GAO examination. To the contrary, Representative Celler explained that "[t]he import of the amendment is to give to the General Accounting Of-

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[8] In addition to this issue of statutory construction, amici's petitions also urged that the Comptroller General's requests for access were invalid on the ground that they were assertedly motivated by an improper purpose. Although professing to recognize that this question is not presented by the petition in this case (Am. Br. 5), amici argue precisely this point later in their brief (*id.* at 25-26). Once again, this discussion is improper; at all events, it is without merit for the reasons stated in our brief in opposition (at 11-12 & nn.8-10) in *SmithKline Corp.* v. *Staats*, *supra*.

[9] See Act of Jan. 12, 1951, ch. 1230, 64 Stat. 1257, amending 50 U.S.C. App. (1946 ed.) 611, repealed, Pub. L. No. 89-554, Section 8(a), 80 Stat. 651.

fice power of investigation and the right of access to all records and to examine all data of any firm * * * [subject to the statute]." 96 Cong. Rec. 17123 (1951).[10] In addition, Representative Hardy, the sponsor of the amendment, observed that the statute would afford "protection" for the government's interest by enabling "the Congress to review or have any action taken to audit [the contract]. If we can get this far we can get action by the Comptroller General and a report to Congress of what he then finds (*id.* at 17045).[11] Representative Hardy also stated that the Act would provide a "deterrent that we did not have under the [existing] law" (*ibid.*), and Representative Celler reiterated that "[t]he power of investigation and inquiry of the General Accounting Office should be an excellent deterrent" (*id.* at 17123).[12]

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[10] This characterization is later repeated in the legislative debates on Sections 2313(b) and 254(c). See Pet. Br. 17-19.

Amici object (Am. Br. 19) that our previous discussion of the legislative history relies in part on statements of opponents of the Hardy bill. This Court has recognized, however, that while "statements of opponents of a bill may not be authoritative, * * * they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." *Arizona* v. *California*, 373 U.S. 546, 583 n.85 (1963). See also, *e.g.*, *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

[11] The legislative history of the subsequent access-to-records provisions echoes this view of the purpose of the statute. See Pet. Br. 17.

[12] As Representative Hardy stated in connection with Sections 2313(b) and 254(c):

> [M]y main purpose in offering this bill was to place on the statute books a law which will act as a deterrent to improprieties in the negotiation of Government contracts. It would be impossible for GAO to inspect even a major

And, on several occasions, concern was expressed that the exigencies of the Korean War might give rise to inordinate profits, the result of excessive pricing having no relationship to fraud on the part of the contractor. See, *e.g.*, 96 Cong. Rec. 17046 (1951) (remarks of Rep. Marcantonio); *id.* at 17124 (remarks of Rep. Reed). This history is fully compatible with our interpretation of Sections 2313(b) and 254(c).

In a statement heavily emphasized by amici (Am. Br. 13-14), Representative Celler further noted that "[t]he amendment will give power to the General Accounting Office to go into the books and delve into the records of these contractors * * * to determine whether or not there is fraud or overreaching or whether they have done anything untoward, in which event reports will be made and suitable action may be taken." 96 Cong. Rec. 17123 (1951). However, this comment hardly suggests that GAO review was intended to be restricted exclusively to cases of fraud or other improprieties, and amici misconceive what was *part* of Congress' purpose to be its *sole* purpose. See *e.g.*, *United States* v. *Naftalin*, 441 U.S. 768, 774-775 (1979); *United States* v. *Culbert*, 435 U.S. 371, 377 (1978). Furthermore, the terms "overreach," which is defined to include "[t]o get the better of; trick; outwit,"[13] and "untoward," which means "[u]nfavorable; unpropitious,"[14] are fully ap-

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part of the books and records of contractors having negotiated contracts with the Government.

* * * * *

Knowledge that the GAO may later examine these books and records cannot help but make for more careful operations by the Government's contracting officers.

97 Cong. Rec. 13198 (1951). Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976).

[13] *The American Heritage Dictionary* 936 (1976).

[14] *Id.* at 1405.

plicable in situations where, as Representative Hardy described them in introducing Sections 2313(b) and 254(c), "[t]he Government representative * * * will * * * be at a tremendous disadvantage" and therefore "the Government will come out on the short end of the deal." 97 Cong. Rec. 13198 (1951).

Likewise, GAO's contemporaneous construction of 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) is not at odds with its present position. Amici rely on the fact that GAO, in letters to Congress on the bill, quoted the preceding statement of Representative Celler on the amendment to the First War Powers Act. See H.R. Rep. No. 791, 82d Cong., 1st Sess. 4-5 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 4 (1951). As just discussed, however, that statement fully accords with, and surely does not foreclose, GAO's access request to respondent. Moreover, consistent with Congress' consideration of both the War Powers Act amendment and the access statutes, GAO also commented that the access provisions in Sections 2313(b) and 254(c) would be "a deterrent to those persons who might otherwise abuse the authority to negotiate certain contracts without advertising. * * * [A]ny abuses discovered by the General Accounting Office in exercising the authority contained [in the bill] promptly will be brought to the attention of the proper officials, and, if warranted, to the attention of the Congress." H.R. Rep. No. 791, *supra*, at 4-5; S. Rep. No. 603, *supra*, at 4.[15]

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[15] The contemporaneous commentators cited by amici (Am. Br. 15 n.18) in fact support our construction of the access provisions. As GAO Assistant General Counsel Welch stated:

> Another important function of G.A.O. [in addition to settlement of claims] stems from the statutory obligation of certain contracting agencies to include in their negotiated contracts a clause to the effect that the Comptroller General or his authorized representatives shall have

Amici also attribute (Am. Br. 16, 19) great significance to the fact that the Hardy bill containing Sections 2313(b) and 254(c) was amended on the floor of the House to provide a three-year limitations period within which the Comptroller General is entitled to request access to a contractor's records. Representative Burton, the sponsor of the amendment, explained that it was

> not intended to restrict the act but simply to clarify and to write into the bill the well established principle of a time limitation. By writing this into the bill there can be no misunderstanding as to the intent of Congress and this will eliminate the uncertainty of how long records must be kept. It will also tend to serve as notice on contractors that they are expected to preserve their records for this period of time.

97 Cong. Rec. 13375 (1951). Representative Hardy stated that he did "not think that [the proposal was] necessary" but that he did "not have any strong feeling about it" (*id.* at 13199) and that he was "willing to accept the amendment" (*id.* at 13376). Thereafter, the amendment was adopted by a voice vote (*ibid.*). In light of its purpose merely to estab-

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access to and the right to examine any pertinent records of the contractor or any of his subcontractors engaged in performance of the work. * * * The authority derived by G.A.O. from these mandatory contract clauses gives the Office valuable assistance in making an effective and complete audit of contract payments.

G.A.O. does not have the authority to disallow wasteful and extravagant expenditures as such for the simple reason that the procurements involved may be legally valid. However, the Comptroller General may report such procurements to the agency head, to appropriate Congressional Committees, or even to the Congress itself when the circumstances warrant.

Welch, *The General Accounting Office in Government Procurement*, 14 Fed. B.J. 321, 326 (1954) (emphasis added).

lish a limitations period, this amendment does not in any way illuminate the substance of the Hardy bill, and the fact that a limit of three years was selected to coincide with the period of GAO review and settlement of the accounts of accountable officers in the government (*id.* at 13197-13198, 13199) is of little import.

Amici also argue (Am. Br. 21-22) that GAO has previously acknowledged its lack of authority to request records relating to a contractor's commercial business rather than to its contracts with the government. Read in context, however, all of these statements simply reflect the unquestioned proposition that GAO has no independent authority directly to seek access to the records of the contractor's commercial business. Nothing in these documents and testimony suggests that GAO is not entitled to such records where, as here, they are necessary in order to determine the reasonableness of the price set in a government contract containing an access-to-records clause.[16]

Similarly, the "should cost" studies cited by amici (Am. Br. 22-23) have no relevance to GAO's right of access in this case. Such studies entail "comprehensive reviews of contractors' operations" (Am. Br. App. 12a) in order "to evaluate the efficiency and economy of the contractors' operations" (*id.* at 13a) and to determine how much the contractors' products "should cost" the government (*ibid.*). Thus, the focus is on the efficiency of the contractors' business, not on the reasonableness of the relationship between the contractor's costs and the contract price. Because of

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[16] Moreover, the examples noted by amici principally involved "[c]ommercial sales records" (Am. Br. App. 9a) and commercial "production scheduling and shipments" records that "only incidentally, if at all, * * * [pertained to] cost and pricing data for the negotiated contracts * * *" (*id.* at 10a).

the required effort and expense by GAO, these studies are generally undertaken only in connection with a major procurement such as tanks or airplanes. "Should cost" studies, unlike the access provisions, are not confined to negotiated contracts, are "not * * * limited to documents and records pertinent to particular contracts" (*id.* at 13a), and are not restricted to cost and pricing records but extend "broadly * * * to all documents, records, personnel, and other data" (*ibid.*) and "all aspects of operations and management, including but not limited to * * * production systems and controls[,] * * * plant design[,] * * * labor standards[,] * * * quality control systems[,] * * * equipment utilization[,] * * * [and] purchasing and subcontracting procedures * * *" (*id.* at 12a-13a). GAO's recognition that its authority under the access-to-records provisions was insufficient to conduct "should cost" studies in no way undermines its request in this case for access to respondent's cost records necessary to assess the reasonableness of the price charged the government under specific contracts.

For much the same reasons, the statute and bills involving studies of the profits of government contractors, upon which amici rely (Am. Br. 23-24), are inapposite here. The authority at issue there extended well beyond that contained in the access provisions. Among other things, those measures related to the overall profitability of contractors rather than to the protection afforded the government's interest in particular negotiated contracts; directly involved both commercial contracts and government contracts; included advertised as well as negotiated procurements; required the contractor to prepare and submit to GAO such information as GAO concluded was relevant to the profit study; authorized the Comptroller General to obtain subpoenas to enforce his rights pursuant to the study; and empowered the Comptroller General to take sworn statements from the contractor. See Pub.

L. No. 91-121, Section 408, 83 Stat. 208; 115 Cong. Rec. 25793-25801 (1969); S. 2268, 94th Cong., 1st Sess. (1975); S. 3014, 93d Cong., 2d Sess. (1974); S. 2049, 93d Cong., 1st Sess. (1973). Thus, these studies far exceeded the scope of the access-to-records provisions, and the need for additional authority to engage in this type of study does not detract from the Comptroller General's right of access in this case.[17]

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[17] Amici suggest (Am. Br. 8 n.10, 14 n.14, 17 n.20) that the Comptroller General's request for access in this case is invalid because the contracts in question are not subject to the Truth-in-Negotiations Act, 10 U.S.C. 2306(f), or the Renegotiation Act, 50 U.S.C. App. 1211 *et seq.* (which expired effective September 30, 1976; see 50 U.S.C. App. 1212(c)(1)). By their terms, however, the access provisions are applicable to "each contract" (10 U.S.C. 2313(b)) and "[a]ll contracts" (41 U.S.C. 254(c)) negotiated under specified authority, and nothing on the face of the statutes indicates an exemption for contracts that are outside the Truth-in-Negotiations Act or the Renegotiation Act. Moreover, the Truth-in-Negotiations Act, which requires the contractor to submit cost or pricing data in the negotiations process and to certify that these data are accurate, complete, and current, and the Renegotiation Act, which dealt with recovery by the government of excess profits, are directed to specific procurement objectives that are distinct from the purpose of the access provisions—to determine whether the government's interest in reasonable prices has been adequately protected and whether future procurements should be made in the same manner. This distinction between the Acts and the access provisions is reinforced by the legislative histories of the access statutes and the 1951 amendment to the First War Powers Act, which distinguished the responsibility of GAO to review the reasonableness of prices in negotiated contracts from that of the Renegotiation Board to recover excessive profits. See 97 Cong. Rec. 13197 (1951) (remarks of Rep. Hardy); 96 Cong. Rec. 17045 (1951) (remarks of Rep. Case of South Dakota). Finally, amici's argument was not relied on by the courts below and was expressly rejected by the court of appeals in *Eli Lilly & Co.* v. *Staats, supra,* 574 F.2d at 916. See also *Hewlett-Packard Co.* v. *United States, supra,* 385 F.2d at 1014.

Finally, amici assert (Am. Br. 3) that there are no generally accepted accounting principles that would enable GAO to make use of the requested records in order to determine the reasonableness of the contract price. As discussed in our opening brief (Pet. Br. 35-36), the issue of allocating indirect costs, while not amenable to scientific precision, is a familiar accounting question. See also, *e.g.*, W. Behrenfeld, *Accounting Desk Book* 90-92, 118-125 (6th ed. 1980); W. Paton & R. Dixon, *Essentials of Accounting* 496, 510-516 (1958); H. Wright & J. Bedingfield, *Government Contract Accounting* 106, 107-114, 218-230 (1st ed. 1979). There is no insuperable difficulty in developing and employing a method of allocation adequate to assess the reasonableness of the price charged the government.[18] Moreover, in accordance with its standard practice, GAO would discuss the proposed allocation system with the contractor and would furnish a copy of its evaluation and conclusions to the contractor for review and comment prior to public release. Through this process, a fair and reliable methodology can be devised.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

MARCH 1981

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[18] Indeed, an analogous issue of allocation frequently arises in connection with cost-based contracts where the contractor seeks reimbursement for its indirect costs.

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